SUPREME COURT, U. S.

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No. 903

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

BAILEY'S BAKERY, LTD., *Petitioner,*

v.

CONTINENTAL BAKING COMPANY and LOVE'S BISCUIT AND BREAD COMPANY, LTD., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit of which review is sought appears at 401 F.2d 182. It also appears as Appendix A to the Petition.

STATUTES INVOLVED

The statutes involved are §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2; § 7 of the Clayton Act, 15 U.S.C. § 18; § 4 of the Clayton Act, 15 U.S.C. § 15; Federal Rules of Civil Procedure, Rule 50(b); and the Seventh Amendment to the Constitution of the United States. These statutes appear as Appendix C to the Petition.

QUESTION PRESENTED

Whether, on the factual record of this case, the Court of Appeals properly determined, in affirming a judgment entered in accordance with a jury verdict finding no violation of the antitrust laws by respondents, that there was insufficient evidence of any illegal activity proximately causing any loss that petitioner had sustained.

Petitioner also seeks to present the question whether the Seventh Amendment to the Constitution would prevent a court of appeals from affirming a judgment on whatever valid legal ground is presented to, but not passed upon, by the district court, including failure of the district court to grant a judgment n.o.v. to a movant for a directed verdict who obtains a judgment on a jury verdict.

STATEMENT

A. Proceedings Below

This is a private action for treble damages arising under Section 4 of the Clayton Act, 15 U.S.C. § 15, against Continental Baking Company and its wholly-owned subsidiary Love's Biscuit & Bread Co., Ltd. It was tried before a jury in the United States Dis-

trict Court for the District of Hawaii. On a special verdict, the jury found that there had been no violation of the antitrust laws. Judgment was entered for respondents on the verdict. On appeal, the judgment was affirmed per curiam by the Court of Appeals for the Ninth Circuit. Noting that "the case was tried before a jury, which returned verdicts in favor of [respondents]," the Court of Appeals concluded that "there was insufficient evidence that any loss which [petitioner] sustained proximately resulted from illegal activity on the part of the [respondents] to justify submission of this issue to the jury."

B. The Parties

Continental is a mainland baking company with plants located in various markets in the United States. Continental never competed, and there is no evidence it ever intended to compete, in Hawaii. In 1960 Continental formed a subsidiary, Love's Biscuit & Bread Co. of Delaware ("Love's Delaware"), which in May 1960 acquired the assets of Love's Biscuit & Bread Co., Ltd. of Hawaii ("Love's Hawaii"). None of the management personnel and none of the policies of Love's Hawaii were changed.

Love's had been in the baking business in Hawaii since 1848. After the outbreak of World War II, it was equipped, under special wartime priorities, to supply large quantities of bread to the military in the Pacific area. Since 1948, when Mr. O. T. Edwards, with a lifetime of experience in the mainland baking industry, came to Honolulu to manage the company, Love's has been retooled twice, resulting in substantial

cost reductions, and has introduced automatic baking equipment and other cost-saving advances in bread production into Hawaii. R. 1019-24, 1098, 1614-16, 1638-44.

Alone among Hawaiian bakers, Love's joined one of the several national baking cooperatives, Quality Bakers of America ("QBA"). These organizations give their members all of the expert promotion, production, management, and accounting services enjoyed by baking plants in a system where the individual plants are owned by one corporation such as Continental. Both the cooperatives and corporate owners have available various trade names for use by the local plants. Continental's principal brand is "Wonder"; QBA's principal brand is "Sunbeam." R. 1605-08, 1655-56.

Love's was for years among the most profitable of the 120 bakers in the QBA system. R. 2344. It consistently had substantial sales and profits during the QBA period and through the two and one-half years covered by this lawsuit. Exs. 3796-98, 572-74. Love's earned a profit during every single quarter of the complaint period. Exs. 832-33. Prior to 1961 Love's regularly produced about 80 percent of the bread sold at wholesale in Honolulu. R. 969-71, 1033-34, 1201-02, 4068-69.

Love's throughout all the years since Mr. Edwards took over has invested a substantial part of its earnings in advertising and other promotion.

Since per capita rice consumption in Hawaii was about twenty times the mainland rate, while bread was consumed at only half the mainland rate (R. 1611-13;

Exs. 5013, 5061-62, 5065), the real prospect for Love's growth, apart from Hawaii's population and tourism increases, lay in the conversion of rice consumers to bread consumers. Love's long-term promotional efforts were directed to this objective, and this was the reason for Love's steady investment in advertising extolling the nutritional advantages of bread over rice, a theme that ran back as far as the early 1950's. R. 1629, 1632-36, 3634-35. Throughout these years Mr. Edwards was urging petitioner and other bakers to advertise the benefits of bread and was even offering to bear most of the cost of such advertising to be published in the name of the entire bread industry. With one exception, all of Mr. Edwards' efforts were rejected. R. 1626, 1678-87, 1795. The attitude of petitioner's management was summed up in the statement to Mr. Edwards, "You spend money. I make money." R. 1690.

Love's other promotional efforts—routine on the mainland, but novel in Honolulu—were also aimed at converting the Hawaiian rice market to bread. Under Mr. Edwards, Love's over the years introduced and promoted variety breads, distributed bread racks to the stores so that the bread (of all bakers) would be adequately displayed, distributed QBA books to stores on how to build profitable bakery departments, distributed free samples and put demonstrators in stores, and engaged in various merchandising efforts directed especially to the young whose dietary habits were not yet formed. R. 1103-05, 1117-18, 1636-37, 1665-73, 2952-55; Exs. 1002, 1003A, 5017, 5112-19. All of this was intended to, and did, build up the total market for bread in Hawaii.

Petitioner, on the other hand, failed even to do routine merchandising. It did virtually no advertising (R. 3073, 3104-06); it had no sales promotion or marketing staff (R. 3889, 3902-03); it never joined a bakers' cooperative such as QBA (R. 1607, 4035); it never attempted to market franchised brands, which are common in the industry (R. 4035-36); it never distributed any point of sale material (R. 4007, 4020); it never distributed variety breads (R. 3109-10, 3996-97); it owned no delivery equipment, one consequence of which was that it could not compete for military business (R. 2097-98, 3020-21, 3075); it produced under the inferior straight dough method, as compared to the sponge dough method used by the entire mainland baking industry and by Love's. R. 1019-20. When petitioner's drivers, who were viewed as solely responsible for petitioner's sales efforts and who followed their own unorganized and overlapping routes (R. 1266-67, 1832, 3075, 4016-22, 4129-31, 4161-62), requested some sales assistance from petitioner (R. 3905, 3984-85, 3992-93), the request was rejected because, according to petitioner's president, "There is nothing very difficult about selling bread." R. 4019.

Petitioner never competed for whole segments of the available business. Not only did it leave the variety bread business and the bun and roll business to others, but its distribution was largely limited to downtown Honolulu, and it made no effort to sell to various commercial buyers. It never competed for any of the military contract business both because it lacked the necessary production and delivery equipment and because it did not want to subject itself to federal wage

and hour legislation. R. 1688-99, 2097-98, 3892-93, 3899-3900.[1]

Beginning in 1957 petitioner experienced a steady decline in sales. From 1956 to 1959, in an expanding market, petitioner's net sales declined from $469,000 to $419,000. Ex. 507B. In 1960, the year of Love's acquisition by Continental, Bailey's sales leveled off at $420,000. *Ibid.* In 1961 they once again resumed their pre-1960 declining trend. *Ibid.*

The company's principal owners testified that the declining trend in petitioner's sales throughout 1957, 1958, and 1959 was of no particular concern to them. The

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[1] Petitioner incorrectly states (p. 24) that the trial court "did not allow the petitioner to show that Love's bid prices to the Army and Navy were below its cost." The proof showed that Love's bid prices to the military were, at times, five cents below its civilian wholesale price. Respondents showed, among other things, that military sales had considerably fewer costs attributable to them and that during much of the period in question petitioner sold to a small-volume civilian account at substantially the same price it was claiming it could not quote on the high-volume, low-cost military business. Exs. 5155-67. The trial court expressly was of the view that the issue of Love's prices to the military was before the jury. R. 3876.

The only complaint petitioner can possibly have is the exclusion of Ex. 3833. This exhibit was offered to prove that either Love's military sales were below cost or, alternatively, that those prices were "unreasonably low." R. 3176-77. The exhibit assumed identical costs of selling bread to civilians and to the military and then pursued various arithmetical steps to establish the amounts Love's would have lost if all its sales were at the lower military price. When the offer was made the record was replete with evidence that major cost factors, such as advertising, stale returns, special display promotions, packaging, and salesmen's commissions, were incurred in the civilian side of the business, but not in the military. *E.g.*, R. 35-38, 411-14, 428-29. The offer of proof took into account none of these cost differences, and was properly rejected on that ground. R. 3178.

reason given was that profits held up in spite of the sales decline. R. 4120-21, 4159.[1] As expressed by one of petitioner's officers and principal witnesses, petitioner "never did concentrate too much on sales at any time .... We got the sales [without working to get them] so we were satisfied." R. 4131. Consequently, as petitioner's officers were forced to admit, the company did literally nothing to halt its sales decline either before or after Continental's acquisition of Love's. R. 3894-98, 3079, 3099. Instead of responding to its sales losses with adequate investments in advertising, capital equipment, and sale support for its drivers, petitioner's management effectively stripped the company of its own financial resources. Over the five-year period 1957-1961 the company made, according to its own records, $48,311 while its owners took out dividends of $59,366. Ex. 507B. Moreover, according to petitioner's own expert witness, the two principal stockholders during the same years drew out an additional $60,000 in unearned salaries! R. 3555; Ex. 5127. This was during a five-year period in which investment in advertising totaled only $27,293. Ex. 507B.

Petitioner's steadily declining profits during the complaint period were not only the result of lower sales, but also of sharply increasing costs. In October 1960 petitioner committed itself to build a new bakery.[2]

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[1] In point of fact, petitioner's pretax earnings dropped from $54,000 to $32,000. Ex. 507B.

[2] Significantly, this decision to invest in new plant and equipment was reached well after Continental had acquired Love's, and after many of the events occurred which petitioner has in this litigation been claiming caused its losses. Moreover, the decision was pursued to completion during the rest of the period in which petitioner now claims for purposes of this litigation respondents were intending to destroy it.

R. 2830, 4135-37. The new building was completed in mid-1961, but from July 1961 to April 1962 it lay unused awaiting delivery and installation of equipment. R. 3918-27, 4139-40; Exs. 5141, 5142. Thus for almost all of the complaint period petitioner was carrying the costs of two plants. R. 3014. In addition, petitioner purposely leased more land for the new plant than was necessary in order to rent out the excess, then was unable to do so. R. 3108-09. The consequence of the decision to build a new plant, and the result of the long delays, was that fixed charges to petitioner for rent, depreciation, and interest alone increased from $12,659 in 1959 to $41,241 in 1962. Ex. 5169; R. 4133. And by the time petitioner finally got the new plant in operation in mid-1962, a new competitor had entered the market and petitioner did not have enough sales to use it efficiently.

The competitive effectiveness of Love's as compared to petitioner's do-nothing merchandising policies while its owners milked the company and incurred sharply higher costs is just one aspect of this litigation. The most significant fact of this lawsuit is that in November 1961—while petitioner's new plant sat idle awaiting delivery of equipment—the bread market in Honolulu experienced the entry of a dynamic new competitor, Holsum Baking Company. Within a matter of weeks Holsum had 30 percent of the wholesale bread sales in Honolulu, petitioner's sales were cut from $30,000 to $20,000 per month, and Love's found itself "fighting for our lives." R. 1410, 1704-05, 1833, 1994; Ex. 988A.

C. The Entry of Holsum Baking Company and Its Consequences in the Market

Holsum came into the market with a broad line of bread and roll products. It featured a "balloon," or expanded, loaf which was a new variety of bread in Honolulu, though common on the mainland. The loaf is softer than ordinary bread. Holsum's expanded loaf was immediately popular with Hawaii consumers and soon became the leading seller in the market. R. 1704-07, 1708, 1833, 3907-10, 3192.

To back up its entry Holsum embarked upon an advertising campaign estimated at the time to be running at a rate in excess of $300,000 per year (this may be compared, for example, with Love's own expenditures of $82,000 in 1960). In all other respects Holsum was an effective competitor. It maintained a consistently high investment in advertising. It trained its salesmen, controlled their routes, and effectively supported their efforts through various merchandising programs. It promoted varieties. It distributed its bread throughout the market. And it bid for and received military contract business. R. 511-12, 1409, 1592, 1661, 1761-62, 1989-90, 3597-99; Exs. 5018A-U, 5130-32.

Holsum's entry was by any measure successful. Throughout 1962 and up to the time of trial in 1966 Holsum remained a vigorous competitor in the Honolulu market. Its sales in fiscal 1964 were $2,500,000 and in fiscal 1965 they increased to $2,760,000. Its earnings position improved every year and by fiscal 1965 profits were $101,200 after taxes. Exs. 3767, 5130-32.

Petitioner's principal witnesses were forced to admit that the company did absolutely nothing to meet the

new competitive conditions brought on by Holsum's entry. Petitioner's management was urged by its salesmen to produce the expanded loaf, but it refused. Love's offered to sell to petitioner at giveaway prices (eleven dollar pans for one dollar) the only equipment petitioner needed to get into production of expanded bread, but still petitioner refused. Petitioner's advertising expenditures in 1961 were a paltry $212 and the company did not engage in any other promotional efforts to respond to Holsum. R. 1708, 3073, 3079, 3099, 3392-93, 3894-98, 3905, 4007, 4126-29.

Petitioner never recovered from the impact of Holsum. After the immediate loss of one-third of its sales petitioner's sales continued to decline. Ex. 988A. Its new plant was not in production until five months after Holsum came in. Ex. 3565; R. 1712. By then its sales volume was only slightly more than half what it had been. With the increased charges from this new and largely idle plant, and with no improvement in sales, petitioner's losses began to pile up. In December 1962 the company's two principal shareholders, one a lawyer and the other an accountant, doubled their stock interest in the company (without investing any new money) (R. 3931) and in January 1963 they filed this action.

D. The Acts Complained Of

Petitioner's complaint was that the acquisition and all of Love's promotional efforts since the acquisition were unlawful. It then pointed to the losses it incurred and loosely asserted that the losses were caused by the complained of acts. The facts of record disclosed the total failure of petitioner's proof, as determined by the jury.

(i) *The Acquisition of Love's by Continental—May 1960.* Petitioner was permitted throughout the trial to introduce documents and to interrogate witnesses in an effort to show that the acquisition by Continental in 1960 was improperly motivated or that it had an impact on petitioner's business or upon competition generally. Petitioner's problem was not any ruling by the trial court but rather its lack of evidence in support of the contention.

The correspondence written by officers of Continental concerning the acquisition of Love's was introduced into evidence. It comprised perfectly business-like communications having not even the faintest overtones of anticompetitive aims. *E.g.,* Exs. 510, 515, 814. The evidence established that Love's was a highly efficient organization, regarded by Continental as located in a growing market with ample opportunity to expand its business as more consumers were weaned away from rice.

There was no evidence that the acquisition of Love's assets had any effect on the market, nor was there any evidence that Continental was a potential independent entrant into the Honolulu bread market. Certainly entry by other firms was not impeded by the acquisition. In addition to Holsum's entry, the market also experienced in 1961 the entry of Oroweat Baking Company, which within a short time enjoyed substantial sales. R. 614-16; Exs. 3760-61.

Petitioner sought throughout the trial to show that Continental subsidized and thereby made possible Love's promotions after the acquisition, but the record is completely contrary. Love's consistent profits have already been noted. The documents show also the very

opposite of subsidization from Continental. For any kind of service received by Love's from Continental—such as entertainment or the supply of miscellaneous equipment—Love's was billed. *E.g.*, Exs. 872-79. In addition, Love's paid a substantial quarterly charge to Continental. This was an amount fixed each quarter by Continental and represents Love's assigned share of Continental's general office overhead. The amounts thus billed by Continental and paid by Love's ranged between $15,000 and $23,000 per quarter. Exs. 870-79. In addition, Love's paid a substantial yearly dividend to Continental. Exs. 571-73. There is no evidence anywhere in the record of money flowing the other way.

The record is clear that Mr. Edwards and his staff continued to operate as they had prior to the acquisition on all matters of advertising, promotion, etc., having any relevance to this litigation and that all decisions of any competitive consequence continued to be made by Mr. Edwards. Love's continued to purchase its supplies independently and continued to decide independently what products to produce and how to promote them. The contemporaneous documentary record established that so far as Continental was concerned Love's business was to be "operated wholly in Hawaii" under the direction of its former management. Ex. 814. The Continental home office staff was cautioned for this reason to check carefully before sending even routine requests for information to Love's. *Ibid.* From time to time Continental personnel were called upon for advice, as when Mr. McNary visited Honolulu early in 1962, but Love's management continued to make all the decisions. The testimony was consistent with the documentary record. R. 1212, 1217-18, 1278-79, 1300-01, 1329-30, 1417-19, 1655-56, 1771, 1780.

(ii) *Post-acquisition Activities.* During the year and a half between the acquisition by Continental and the entry of Holsum into the Honolulu market Love's attempted—unsuccessfully—to market in Honolulu a bread made by a new process under the name "Magic Mix"; it conducted a bread-of-the-month advertising campaign in which various old and new special variety breads were featured; it introduced a few bread, cake, and frozen food items under Wonder and other Continental trade names; and it met a promotional allowance given by a competitor to one food chain, Foodland. After Holsum's entry into the market with its expanded loaf, Love's introduced its competitive loaf, the "Soft Rolled" brand, and advertised it so as to arrest the alarming losses of sales caused by Holsum's entry.

Whether Love's activities were unlawfully motivated or, alternatively, were excessive or inconsistent with normal business practice, was fully ventilated at the trial. The jury was instructed that a monopolist could not pursue "predatory" or abnormal or unreasonable competitive activity. The jury's verdict demonstrates that it found no fault with these actions of Love's.

ARGUMENT

This case involves no important or novel antitrust law principle. It raises no issues that are of substantial significance beyond the confines of this case. It presents a unique factual record that is unlikely to be repeated. Contrary to petitioner's argument, the decisions below present no conflict with prior decisions of this Court.

After a full trial and fair and proper instructions, a jury determined that respondents had not violated the antitrust laws. The judgment entered on the jury

verdict was affirmed per curiam by the Court of Appeals on the ground that the facts were so clear that even the submission to the jury of the issue of whether "illegal activity" of respondents had caused any injury to petitioner was not justified. Even on petitioner's reading of the Court of Appeals' opinion,[1] in order for petitioner to prevail in this litigation it would have to show *both* that the District Court erred in its handling of the violation issue *and* that the Court of Appeals erred in its treatment of the proximate cause issue. Petitioner can make neither showing on the facts of this case and review by this Court is not warranted.

I. THE DISTRICT COURT JUDGMENT FOR RESPONDENTS IS NOT IN ERROR

A. The Court's Instructions Were Fair and Proper

Petitioner's assertions of violation of Section 2 of the Sherman Act[2] involved the offenses of actual mo-

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[1] Petitioner reads that opinion as dealing only with the proximate cause issue, one the jury did not reach. On the other hand, the reference in the opinion to "illegal activity" suggests that the court was focusing on the very issue decided by the jury, the issue of violation *vel non*, and was saying that not only was the jury verdict justified but that respondents' motion for directed verdict on this issue should have been granted.

[2] Petitioner argues that the trial court's ruling dismissing Count 1 of the second amended complaint, which purported to allege a violation of § 7 of the Clayton Act, is inconsistent with Dailey v. Quality School Plan, Inc., 380 F.2d 484 (5th Cir. 1967). The district court's ruling should not be read inconsistently with *Dailey*.

In *Dailey* the court concluded that the allegations of the complaint stated sufficient causal relationship between the merger and the damage complained of to warrant a trial. In the present case the second amended complaint actually negatived any such showing by alleging at great length that the fact of the acquisition had not changed anything. Injury was caused, according to the

nopolization, conspiracy to monopolize, and attempt to monopolize. The court carefully delineated the substance of these different offenses in its charge, and the jury found for the respondents on each offense.

Actual Monopolization. Regarding this claim the trial court first told the jury that proof that either defendant had monopolized would be sufficient and that, as a practical matter, the parent-subsidiary relationship made it unnecessary to distinguish sharply between the two. R. 5009-10. The court then defined the proscribed monopoly power as the power over price and/or the power to exclude competitors from the market or prevent the successful entry of a competitor into the market. R. 5010-12.[2]

Notwithstanding petitioner's assertion that the trial court's instructions did not grant any legal significance to respondents' asserted monopoly power, the jury was pointedly told that the mere existence of the power to control prices or to exclude competition when it is desired to do so, coupled with the general purpose and intent to exercise the power, results in monopolization. R. 5012. *United States* v. *Grinnell Corp.*, 384 U.S. 563;

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complaint, by a continuation of the merchandising acts and policies allegedly begun years before the acquisition and continued thereafter, not because of the acquisition but in spite of it. Cr. 156-58.

Moreover, the trial court's ruling in this case did not result in the exclusion of any evidence, and the record bore out the lack of any causal relationship. It showed that Continental did not subsidize any of Love's expenditures and that Love's continued to be run by the same people after the acquisition exactly the way it had been run before.

[2] This is the standard definition, supported by ample authority. *See, e.g.*, United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391; United States v. Griffith, 334 U.S. 100, 107.

United States v. *Griffith, supra.* This being an action for damages, the court correctly stated that it must be shown that the power—if it existed—was exercised. This was accompanied by an instruction that any use of such power, "no matter how they got it, if they use that for the purpose of excluding competition or gaining an unfair competitive advantage, or to destroy a competitor, then that is unlawful." R. 5013.

The jury was told that the law did not necessarily prohibit Love's and/or Continental from engaging in "ordinary competitive activities which are normally engaged in by any company" and that Love's could, for example, make "normal and reasonable" advertising expenditures. R. 5014. The court went on, however, to say that if either respondent did have monopoly power in the market it could not pursue advertising and merchandising policies that were *either* "in fact, excessive and inconsistent with normal business decisions" *or* "even though not excessive or abnormal . . . were formulated with a purpose and design to cripple competition or exclude it from the market." R. 5016. Further, the jury was told that aside from any actual intent on the part of the defendants, they had violated the law if, having monopoly power, they "knew or should have known that the necessary effect of its acts and policies which are here challenged would be to eliminate or prevent competition . . . ." R. 5017.

Finally, the jury was told that "the employment of means, in and of themselves lawful" becomes unlawful if "done for the purpose and intent to use monopoly power." In such circumstances "even lawful acts become unlawful." R. 5018-19.

Conspiracy to Monopolize. The court distinguished the charge of a conspiratorial attempt to monopolize

from the claim of actual monopolization and instructed that under the conspiracy claim petitioner need not show that the desired end of monopoly power was obtained. R. 4999-5001. Addressing itself to the issue of parent-subsidiary conspiracy, the court told the jury that it was not unlawful for representatives of Continental and Love's to discuss and agree upon the normal conduct of Love's business; but that if "any or all of such apparently normal business relationships and acts . . . were, in fact, implementation of a mutual agreement or plan or scheme or conspiracy or attempt to monopolize" the market, a violation of the antitrust laws would be made out. R. 5002.

Attempt to Monopolize. On this allegation the court charged that to establish a claim of attempt to monopolize against either respondent petitioner had the burden of showing a specific intent to monopolize and some act done in furtherance of that intent. The court further charged, as requested by petitioner (R. 4635-36), that there must appear a reasonable probability that the monopolization will sooner or later occur. R. 5021.

With specific reference to Continental's acquisition of Love's, the jury was told that on the record of this case the acquisition was not, standing alone and in and of itself, unlawful. It was further told that petitioner was entitled to have the evidence considered as a whole, to have the "full benefit of its proof in the light of the entire picture presented" (R. 4987), and that if the jury found

> "that the acquisition was made for the purpose of or in furtherance of any conspiracy of the parties to monopolize, or an attempt of the parties to monopolize, or resulted in monopolization of the bread and bread-type rolls market in Honolulu,

then the acquisition would therefrom and thereby become unlawful." R. 5022-23.[1]

B. The Evidentiary Rulings Were Proper

Petitioner also complains of various evidentiary rulings of the trial court, placing particular emphasis on the exclusion of a consent order issued by the Federal Trade Commission.

The consent order, Ex. 581, was the result of a complaint by the Commission in 1960 that three acquisitions by Continental in 1958, involving baking plants in six cities in the continental United States, violated Section 7 of the Clayton Act. The issues that for a time were litigated with the Commission's staff were simply whether the acquisitions might substantially lessen competition in each of the separate marketing areas in which the acquired company had a baking facility. Hearings were held in four of the markets; no hearings were held, and no record was developed, on the other two. R. 2749.

The consent order itself stated that it was not to the effect that Continental had violated any law. Indeed, the supporting Appendix, included in Ex. 581, recited that of the three acquisitions challenged, two were lawful. Continental agreed to divest the third, but there was no finding that even that acquisition was unlawful.

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[1] Petitioner asserts that it was error for the trial court to "immunize" the acquisition of Love's. But the quotation from R. 5022-23 immediately above shows this objection is not supported by the text of the charge.

The court's instructions as to the purpose of the Sherman Act (Tr. 4990-93), complained of by the petitioner (Pet., p. 28), are accurate, especially in the context of instructions making it very clear to the jury that at issue was whether respondents' competitive activities were unlawfully motivated or excessive or abnormal.

The trial court found that Love's acquisition was never challenged or litigated in the Commission proceeding and that therefore any Commission order arising out of those proceedings was wholly irrelevant to the issues in this litigation. R. 2753-54. This was plainly correct. *E.g., Buckhead Theatre Co.* v. *Atlanta Enterprises, Inc.*, 327 F.2d 365 (5th Cir. 1964), *cert. denied*, 379 U.S. 888; *Park Neponset Corp.* v. *Smith*, 258 F.2d 452 (1st Cir. 1958); *Paramount Film Distributing Corp.* v. *Village Theatre, Inc.*, 228 F.2d 721 (10th Cir. 1955).

Because the ruling was on relevance grounds, there was no reason for the trial court to consider, and it did not consider, whether the consent order met the requirements of Section 5(a) of the Clayton Act.[1]

Similarly, petitioner's complaint that a memorandum prepared by an advertising agency employee, Ex. 601, was not admitted against respondents is without merit. In the first place, the exclusionary ruling was largely vitiated by the fact that the trial court permitted ques-

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[1] In fact, there are two reasons why the consent judgment was not admissible under § 5(a). First, the order creates no "estoppel" against Continental. The order itself recites that there was no finding that Continental had violated any law. Section 5(a) renders a prior judgment admissible only as to questions "distinctly put in issue and directly determined" in the prior proceeding. Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 569.

Second, a Commission order is not a "final judgment or decree" within the meaning of § 5(a). Highland Supply Corp. v. Reynolds Metals Co., 221 F. Supp. 15 (E.D. Mo. 1963), *aff'd*, 327 F.2d 725 (8th Cir. 1964). Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, is not to the contrary. That case dealt solely with an interpretation of § 5(b) of the statute, and this Court was careful to distinguish the entirely different issue raised under § 5(a). 381 U.S. at 316-18.

tioning for days on end during which, as the petition itself shows (Pet. 20), petitioner's version of the memorandum was put before the jury. R. 1225-59, 2039-74, 2275-2308, 2465-2629. Moreover, in spite of being afforded full opportunity for examination, petitioner was never able to show that the exhibit had ever been adopted by either respondent.

There is no more merit in petitioner's other contention that evidence relating to claimed violations of Section 2(a) of the Robinson-Patman Act was improperly excluded. As for Love's restaurant prices on buns and rolls, petitioner put into evidence the prices quoted in 1957, long prior to the acquisition and to the damage period involved. This was admitted into evidence on petitioner's representation that petitioner would submit proof that these prices were designed to exclude Snowflake Bakery (not petitioner) from the bun and roll business. No such proof was ever tendered by petitioner, so the trial court struck the evidence. As for Continental's prices from its West Coast plants on bread sold under the Wonder label, the facts were that before the acquisition there was a one- or two-cent difference between these prices and Love's prices in Honolulu, and the acquisition did not result in any reduction in Love's prices. In addition, Love's prices actually were higher than those quoted by petitioner and there was not even an offer to prove how they could have caused any injury to petitioner.

II. THE COURT OF APPEALS' JUDGMENT IN FAVOR OF RESPONDENTS IS NOT IN ERROR.

A. The Court Would Have Been Correct in Concluding That Petitioner's Failure to Prove Any Connection Between the Claimed Wrong and Injury Required Judgment for Respondents

Petitioner construes the Court of Appeals' opinion as dealing solely with the proximate cause issue and argues that that court erred in holding that there was insufficient evidence to justify the submission of this issue to the jury. It is not correct to construe that opinion as excluding the issue of violation from the scope of the affirmance. However, even if the opinion is so limited, there was no error on the facts of this case.[1]

Petitioner's sales had been declining since 1957. During the complaint period they continued to decline, except in 1960, the year in which the acquisition took place, when they stayed even. After Holsum's entry in 1961, petitioner's sales went down at a faster rate. There was never any proof offered that even remotely connected these sales losses to acts of respondents. No case cited by petitioner even suggests that its case can be made out simply by showing alleged wrong and unconnected injury.

If the truth were that Love's routine promotional efforts in Honolulu had had any impact upon petitioner's business, the proof would have been available. Witnesses were readily available in Honolulu from

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[1] Even if this Court should conclude that the court of appeals has not already affirmed the trial court's judgment on the violation issue, it is clear that petitioner's attacks on that judgment are so lacking in merit that on remand to the Court of Appeals that court would affirm the judgment on the jury verdict of no violation.

Foodland and other supermarkets, restaurants, military contract purchasers, etc. Petitioner called none, though respondents did. Petitioner's own books and records, from which any losses occurring contemporaneously with any complained of promotions could have been shown, if they existed, in fact showed continuing losses since 1957, sharp losses after November 1961 due to Holsum's entry, and weekly sales declines wholly unrelated to the dates of any of Love's promotions or so-called new variety introductions. Exs. 998A; 3690-91. On this record *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, relaxing the required proof of causation in circumstances where plaintiff's losses are unexplained except for defendant's acts, is plainly inapplicable.

Nor is there any basis for the claim that the Court of Appeals' action conflicts with *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690. This Court there held that the jury could determine that a plaintiff's inadequate supplies of a raw material and consequent injury were due to defendants' concerted action to monopolize this material and to refuse to sell it to the plaintiff. Here, contrary to *Continental Ore,* the Court of Appeals was not of the opinion that a violation of law had been made out. And here the court, again contrary to *Continental Ore,* made no restrictive ruling that could serve as a limiting precedent for future cases as to the quality of proof necessary to show impact on the plaintiff of established violations of the antitrust laws.

Petitioner's position appears to be, citing a footnote in *Utah Pie Co.* v. *Continental Baking Co.*, 386 U.S. 685, 696 n. 12, that its evidence on proximate cause was sufficient because, in its words, "proof of defend-

ants' intent to exclude him is sufficient for the plaintiff to obtain a judgment . . . that his exclusion was caused by defendants."[1] (Pet., p. 32). This asserted anti-competitive intent of respondents is emphasized throughout the petition (Pet. 15-24, 29, 30, 31, 34, 36) and is argued as sufficient to make up for petitioner's failure to prove any facts showing a connection between alleged wrong and injury. Petitioner ignores the fact, however, that this very question of respondents' intent was presented to the jury and was resolved in favor of respondents. *See* pp. 16-18, *supra.* Thus, it is clear that the jury rejected petitioner's case as he himself defines it and that, even if petitioner's reading of the Court of Appeals' per curiam decision were correct, there was no prejudice. For it is the jury finding, not any asserted error of law, that militates against any recovery by petitioner in this litigation.

B. The Judgment Was Proper From a Procedural Standpoint

Petitioner's claim that the Court of Appeals' opinion conflicts with the Seventh Amendment is based on its reading of that opinion as dealing only with the proximate cause issue. We have already noted that the opinion should not be so construed. In any event, even if petitioner's narrow reading were correct, the opinion does not conflict with the Seventh Amendment, and is well within the authority of the Court of Appeals.

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[1] In fact, *Utah Pie* dealt only with the question of whether plaintiff had presented sufficient evidence to satisfy the statutory standard of the Robinson-Patman Act relating to possible injury to competition. Whether the plaintiff there had satisfied the more stringent requirement of proving that its injury had been caused by defendants' unlawful acts was not before the Court.

The short and complete answer to petitioner's Seventh Amendment argument was given by this Court in *Neely* v. *Eby Construction Co.*, 386 U.S. 317, 321-22:

> "The question here is whether the Court of Appeals, after reversing the denial of a defendant's Rule 50(b) motion for judgment notwithstanding the verdict, may itself order dismissal or direct entry of judgment for defendant. As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment *n.o.v.* than when a trial court does; consequently, there is no constitutional bar to an appellate court granting judgment *n.o.v.* See *Baltimore & Carolina Line, Inc.* v. *Redman,* [295 U.S. 654]."

Here, the Seventh Amendment would not have barred the trial court from granting a directed verdict to respondents; even if the Court of Appeals' opinion were to be construed (erroneously) as a grant of that motion, the Seventh Amendment would not have been violated.

Nor was there any violation of Rule 50 of the Federal Rules of Civil Procedure. Rule 50(b) provides for the filing of a motion for judgment n.o.v., along with a motion for new trial, by a movant for directed verdict who receives an adverse jury verdict, and it does not contemplate the filing of an n.o.v. and/or new trial motion by the party who prevailed on the jury verdict, as petitioner urges respondents were required to do. Common sense would be offended were the party prevailing on a jury verdict required to move to set aside the jury verdict, and the demands on trial courts would be greatly increased if they were required to render advisory opinions on numerous legal issues, rulings on which were made unnecessary by the jury verdict.

The propriety of the Court of Appeals' action is supported by consistent authority to the effect that a

prevailing party is not required to notice an appeal or take any other action in order to be in a position to urge in support of the judgment in his favor any ground for which there is record basis. *Jaffke* v. *Dunham,* 352 U.S. 280; *Langes* v. *Green,* 282 U.S. 531. Even where the district court rejected an appellee's argument but found for it on other grounds, the appellee can urge this very argument on appeal in support of the lower court judgment. *United States* v. *American Ry. Ex. Co.,* 265 U.S. 425; *Stroud* v. *Brown,* 254 F.2d 448 (4th Cir. 1958), *cert. denied,* 358 U.S. 817. A fortiori, appellee can urge on appeal an argument made at the trial level but not passed on by the trial court. In both of these situations, courts of appeals can, as the Court of Appeals did here, affirm the trial court judgment on grounds other than those relied on by the trial court.

This result is also dictated by the federal harmless error rules, 28 U.S.C. § 2111 (1964), and Rule 61 of the Federal Rules of Civil Procedure. If a court of appeals determines that a verdict should have been directed notwithstanding that there is error which vitiates the jury verdict,[1] the substantial rights of the

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[1] We repeat that here the Court of Appeals did not find that there had been any error in the trial court which would not permit the jury verdict to stand. *Compare* Thurber Corp. v. Fairchild Motor Corp., 269 F.2d 841 (5th Cir. 1959), relied on by petitioner (Pet. 41). In *Thurber* the court felt it was suggesting a meaningful procedure in remanding with an opportunity for appellee to move the trial court within ten days for judgment n.o.v. Plainly, however, where the appellate court is of the opinion, as this one was, that the record would not support any ruling other than a grant of that motion, such a procedure would be meaningless. Implicit in the appellate court's holding that judgment should be for the appellee is consideration of the new trial question and the conclusion that no reason exists for the trial court to consider such a motion. This disposition is clearly within the statutory authority of courts of appeals for the reasons stated in the text.

parties are not affected if the court of appeals so orders. See *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 289 F.2d 86 (9th Cir. 1961), *rev'd on other grounds*, 370 U.S. 690. In that situation the court of appeals has authority to determine whether to order the entry of a verdict or to remand for a new trial, or it can remand the case to the trial court to make this determination. 28 U.S.C. § 2106 (1964); *cf. Neely* v. *Eby Construction Co., supra;* Fed. R. Civ. P. R. 50(d). The authority thus extends to avoiding a meaningless second trial.

CONCLUSION

For the foregoing reasons the Petition for Certiorari should be denied.

Respectfully submitted,

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